

1. Background

Cases at international level are inherently complex both in terms of size and scope as they deal with socio-political conflicts. These cases are instituted to bring masterminds of the conflicts to justice and hold them accountable for the crimes they committed or continue to commit under the veil of the conflict.

The International Criminal Tribunal for Rwanda (ICTR) was established on 8 November 1994 pursuant to Security Council Resolution 955. The first arrests were made on 10 October 1995¹ and the ICTR confirmed its first indictment on 28 November 1995². On 2 September 1998³, the ICTR delivered its first judgment in the Akayesu case. The judicial process in this first case took nearly three years following Akayesu's arrest to rendering of the trial verdict.

However, on account of the complexities of the cases and work load of the Tribunal, the same length of time to adjudicate all other cases could not be replicated. The first level judicial process took more than three years for 62 out of 76 accused persons tried by the ICTR. The delay was greater in multi accused cases⁴ involving mid to high level government and military officials. In these more complex cases, trial proceedings commenced about 4 to 5 years after arrest of the

¹ Jean Paul Akayesu and George Anderson Rutaganda were arrested in Zambia.

² First indictment known as the Kibuye case against Clement Kayishema, Charles Sikubwabo, Aloys Ndimbati, Ignace Bagilishema, Vincent Rutaganira, Muhimana Mika, Obed Ruzindana and Ryandikayo was confirmed on 28 November 1995.

³ Prosecutor vs. Jean Paul Akayesu

⁴ Government 1 case, Government 2 case, Military 1 case, Military 2 case and Butare case involving 22 accused persons

accused persons and transfer to ICTR. The trial processes lasted for 6 to 8 years and appeal processes took 2 to 4 years.

2. **International trials and role of case management**

During the presentation of the prosecution case, which is vast in size and scope for international crimes, individualized incidents are used to pin down the accused persons and link them to conflict. A complex social political conflict engaging all apparatus of the governance, command structures, and control mechanisms is reconstructed during trial. Evidence is led to establish individual criminal responsibilities based on particular incidents or crime scenes.

Streamlining the case is required to satisfy the competing demands of providing a trial that is both fair and expeditious. It requires a holistic understating of the conflict and its various stakeholders, as well as their functioning, personnel, modus operandi, leadership, organizational and operational structures, and the relationships among themselves.

Judicial process of an international case starts after the confirmation of the indictment, which is drawn by the Prosecutor. The Prosecutor, under the Statute, is "responsible for the investigation and prosecution of persons responsible" for crimes, "shall assess the information received or obtained and decide whether there is sufficient basis to proceed", and "shall act independently".

The important case management provisions are contained in ICTR Rules 47, 50, 73 *bis*, 73 *ter*, 90 and 98 *bis* of the Rules of Procedure and Evidence. Under these provisions, the Trial Chamber exercises its rights to keep the trial proceedings focused. In addition to the above Rules, Rule 92

bis and Rule 94 are also relevant to make trial proceedings efficient as under these Rules, the Trial Chamber may admit the evidence in the form of a written statement in lieu of oral testimony (Rule 92 *bis*), take judicial notice of facts of common knowledge, adjudicated facts and documentary evidence of other proceedings of the Tribunal (Rule 94), and admit the statement of the expert into evidence without calling him (Rule 94 *bis*).

Pre-trial and pre-defense provisions are the tools which determine the nature and scope of the cases and the evidence to be tested. Rule 90(F) is explicit that the trial chamber shall control the proceedings for the ascertainment of the truth. This way, the trial chamber is continuously engaged in the process to ascertain the truth.

There is a macro case management, where the Trial Chambers have adopted more global forms of intervention mechanisms available to them to control the scope of the party's case. This has been in the form of limiting the number of witnesses, imposing time limits on the party's case, practice directions, enforcement of timely filing of pleadings and consistent monitoring.

Micro level case management exists where the trial chambers carry out detailed analysis of the case and then adopt micro level intervention mechanisms, such as, selection of witnesses or categories of witnesses, limiting number of witnesses on specific issue, delivering judgment during the proceedings about the sufficiency of evidence or entering acquittal or dropping allegations, using written testimony in lieu of oral evidence, flexible approach to introduce documentary evidence and judicial notice of facts.

There has to be a reasoned opinion in writing to ensure that the guilt is proved beyond reasonable doubt. The cases are brought by the Prosecutor and a finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt. Hence, the primary onus is on the Prosecutor to ensure that the trial proceedings take place smoothly. This has necessitated the Prosecutor to manage his case by streamlining and focusing on objective and efficient presentation.

The Prosecutor has adopted various mechanisms in the form of case management to discharge his responsibilities effectively and efficiently. These mechanisms enhanced teamwork and collaboration amongst the management, investigations, evidence unit, trial sections as well as with other organs of the Tribunal, such as Witnesses Victims Support Section (WVSS), Trial Chamber Coordinators and Language Section. These mechanisms can be clubbed into two categories, Office of the Prosecutor (OTP) wide mechanisms and individual team wide mechanisms.

3.1 OTP wide mechanisms

3.1.1 Continuous improvement in methods of collection of evidence and it's analysis through digitization of investigation/evidence records

While fulfilling its responsibility of investigation, the OTP adopted a pragmatic approach for the collection of evidence and its analysis. Collected evidence was in the form of written statements, paper records created in 1994 and before 1994, audio tapes of radio broadcasts, video tapes of

various news broadcasts and paper based photos. Evidence was also collected through co-operation with Rwanda, other states and independent organizations. In 1994 most of the evidence was paper based and audio-visual records were analog. The nature and format of the evidence started changing over the years, as numerous digital evidences were also collected, either seized from the accused or submitted by third parties.

In 1999, the OTP started digitizing its large collection of evidence and all paper records were scanned according to Archives and Records Management Standards, followed by audio tapes and video tapes digitization. This digitized archive, supported with powerful software such as ZyLAB became the widely used database for every possible analysis relating to cases that every member of the OTP used on a day to day basis. This acted as an open library on every desktop in OTP.

Evidence preservation and security were enhanced with the transfer of evidence collection from Kigali to Arusha, where the collection was stored in a strong room with strict access and environmental controls, such as temperature (18 to 22 degree Celsius for paper records), relative humidity (35% to 45%) and fire detection and suppression systems.

Presentation of evidence was also carried out in digital form, through the use of appropriate software for playing digitized audio and/or video files, displaying digitized documents and photos, streaming the trial transcripts in real time (**Live Notes**), referencing and exhibiting digitized evidence simultaneously to all parties.

With large quantity of documents to be disclosed, the teams found it easy to use CDs and DVDs, where thousands of pages were stored and handed over to the parties. The reliability of evidence was not challenged because OTP maintained the integrity of process through Standard Operating Procedures, chain of custody, and functional autonomy to the unit responsible for digitizing and adapting software tools.

When this technology became functional, the attorneys started attending court sessions almost without paper files and binders but with laptops and flash drives and were able to share and use information quickly. The process for digitization and information retrieval was in line with the best practices in the field. Digital copies were true replica making them reliable and usable. In some cases, quality of images was improved in the digitization process, especially in the case of handwritten or faded notes and audio and video tapes. As a result of the digitization, systems for the storage, filing, indexing and retrieval of evidence were improved. Through this well organized evidence collection, presentations of cases in court were smooth.

Digitized evidence poses more problems of organizing the database and creating description of electronic records rather than the actual process of digitizing. Only when a storage system is supported with a reliable mechanism of cataloguing and indexing, the relevant records can be easily retrieved. Hence, all efforts were made to create a functional reliable digitized evidence storage enabling it to deliver its purpose of streamlining investigation, analysis and case management.

Another challenge lies with records in handwritten and in a non-common language. At an International Tribunal like the ICTR, digitized records including handwritten and non-common language documents must have thorough descriptions to enable attorneys to fully utilize them. A good description of the electronic evidence enables OTP personnel to retrieve and conduct analysis and electronic mappings software, to compare and analyze the information in possession of the OTP. With almost one million pages of digitized evidence in its possession, an inaccurate or incomplete description could result in a piece of evidence being lost in massive electronic records. This deficient entry could result in delayed disclosure of evidence and have a significant impact in the judicial process. The OTP developed capacity for finding such relevant documents through enhancement of ZyLAB. Specialized research officers were also engaged to carry out complex searches and analysis for such materials.

Finally digitized records may pose a problem of reliability in the court room. Statements and documents presented in electronic form are of two natures, either they are born-digital format, or they are digitized from an existing paper, digital or audiovisual format. In the time ahead, forensic examination of each electronic document needs to be done and also, custody of the machines where the document was created has to be established. The chain of custody and forensic analysis of such electronic evidence will become a serious issue and need to be fully documented.

Before ICTR Trial Courts, there were audio and video tapes presented as digitized. On account of integrity of the process and the nature of tapes being analog, the contents were not challenged

and they were accepted on their face values without in-depth forensic analysis. But, in the time to come, such evidence may be challenged for reliability issues and then the solution will be to have an history of each or group of tapes, describing its provenance, transfer and chain of custody in the OTP. There would be tapes from multiple sources and on account of digital technology, tampering would be easy and so with each image – reliability analysis has to be established. Further, these video images, audio clips and photos would all be in digital form and their transmission would be through internet platform, which would pose a new challenge about content reliability and transmission security.

3.1.2 Evidence unit tools - common databases and software

OTP developed a common MicroSoft Access and SQL Server based database, known as Global Evidence Legal Officer Database (**GELOD**) for assigning pseudonyms to witnesses and to keep other case related data having features to generate Disclosure Reports and Witness Evaluations. Each witness listed in the case for testimony was assigned a pseudonym to protect identity. Before this OTP wide software, each case team assigned pseudonym individually and some of them were repeated which created confusion while referencing them in various trials and witness management functions. GELOD was also used for other case related data management, such as disclosure functions but over the period, these data were not updated as data management shifted to new technology such as ZyLAB, TextMap and CaseMap.

ZyLAB Database is a digital repository for evidence. In this, every digitized document is full text searchable. Logical search methods allow the user to search for the relevant document(s) from

the repository, which was also indexed under various classifications on the basis of types and relevance of documents. Then, **TextMap** was used for the searchable analysis in the trial transcript of case. All the trial teams used **CaseMap** where, trial data and summaries of trial records, testimonies portion and exhibits were inputted to link them to facts and issues of the case. Analyst teams used **i2 Analysts Note** for analyzing evidence and possible linkages to targets. They assisted the OTP in making decisions about target selection, assessment of the sufficiency of evidence and possible leads to gather more evidence. OTP also used **SharePoint** for document management, which facilitated more than one person working on the same document at the same time and sharing a single document among various members of the team.

OTP also developed Microsoft Access based **OTP Witness Management** Database containing all personal particulars of the witnesses. This database assisted the witness management team in carrying out their day to day functions, which were, inter-alia, assisting the WVSS to locate the witnesses for making their travel arrangements and assisting the witnesses in their safety assessments and welfare measures. Complexity of investigations and issues under judicial process necessitated the OTP investigation and trial teams to contact some witnesses on many occasions and this database also recorded details of all contacts made with them. This database along with availability of all statements and interview notes in ZyLAB Database facilitated the OTP personnel to acquaint them with previous interviews to prepare interview plan and so, improving the quality of investigations and efficient disclosures of all relevant witness related material.

These technology-driven tools improved the OTP capacity to store, retrieve, analyze and disseminate data throughout the OTP. But, now with the advent of the current advanced

technology, some databases could be converted to a secure web-based mobile application that could be used by the OTP personnel in the field.

3.1.3 Understanding the conflict and it's conceptualization - master chronology and sharing information with trial teams and experts

The OTP had an office wide policy to develop case theory of each case. In this process, linkages between the incidents and context were analyzed. All instances having reference to target accused person(s) were gathered from all sources. The sources were: witness statements, public reports received from international organizations, Radio Rwanda/RTLM broadcasts, seizures from accused persons, diaries and note books of accused persons and other people, and records/documents from various offices in Rwanda. The **Master Chronology** Database having an exhaustive mapping of all information in time and geographical space along with other contextual information about political developments, meetings and incidents gave the most comprehensive scenario and the possible impact of the acts and conduct of the accused persons. This analysis assisted the OTP trial teams in articulating case theory in the indictment by incorporating circumstantial facts, *mens rea* element and causal effect of the overt acts of the accused persons.

The role of experts was enormous as they assisted the OTP to understand the social, political and cultural contexts. OTP worked very closely with experts for the forensic examination of various contemporaneously generated documents and audio video materials, such as RTLM tapes, Radio Rwanda tapes, video clips, handwritten diaries/ note books/ letters and other authored documents and deciphering and understanding them. They facilitated the OTP trial teams in

conceptualizing the conflict to translate and apportion criminal liabilities on the planners and executors.

Coordination between trial teams and sharing of information had been an issue of concern for some time but later, it was ensured through regular meetings, creating support units on common areas of investigations and trials and developing OTP Global Information Network (**OTP portal/ Jalaw**) .

3.1.4 Review of indictments – review committee/ hierarchical and peer review

Each case in the OTP was handled by individual prosecution teams, but the Prosecutor as a whole, was responsible for the conduct of case, including its presentation and pleadings, as the Prosecutor is an indivisible entity. Indictment is the starting point which defines the boundaries of the case and puts the accused on notice of charges against him/her. Indictment ought to be specific with sufficient details, so, the accused is aware of the charges and can prepare his/her defence.

OTP set up an Indictment Review Committee consisting of senior management staff of the OTP to review each indictment before it was approved and signed by the Prosecutor and filed before the Trial Chamber for confirmation. During the review process, the draft indictments were rigorously vetted on their case theories and factual and legal pleadings vis-à-vis available evidence. Under the new indictment policy put in practice in July 2004, all new cases had single accused indictments, as the single accused cases moved faster than the multiple accused cases.

These indictments followed certain principles, including simplicity, avoiding excessive number of charges, charging only the crimes where there is cogent evidence and not applying lesser or subsequent charges when there is compelling evidence in major charges such as genocide and extermination.

On account of this mechanism, the OTP's indictments were drafted with greater uniformity in terms of case theories, approaches, and evidence assessments. Improved pleadings, focused factual evidence, individual criminal responsibility linkages, and holistic contextual scenario articulation were noticed in the indictments, which resulted in better case management during their presentations before the trial chambers.

3.2 Individual team wide mechanisms

3.2.1 Case analysis – thematic and evidence analysis

Teams working on individual cases, carried out thematic analysis of their respective cases and organized evidence and witnesses according to themes, case issues and paragraphs in the indictment. Teams also developed accused and events chronology, in which mapping of all case related events and accused itinerary was done on a time and geographical space. Relevance and provenance value of each evidence and witness were noted.

OTP drafted indictments after proofing and selection of witnesses and the selection of witnesses was based on specific criteria aimed at expediting the trial process limiting the number of witnesses to those absolutely necessary to prove the case. On the basis of this mechanism, the

trial teams decided on the evidence which should be persuaded for (a) its admission in the form of a written statement in lieu of oral testimony, (b) judicial notice of facts of common knowledge, adjudicated facts and documentary evidence of other proceedings of the Tribunal, and (c) its admission through expert witness(es).

This analysis facilitated the trial teams to prioritize the witnesses, sequence their depositions, organize order and manner of introducing evidence, organize sequence and issues of examinations and responding to Trial Chamber's direction with regard to case management functions and case planning.

3.2.2 Case management time line

Every team maintained a time line on case management issues and it consisted of trial session scheduling, witness appearance order and witness examination durations. On the basis of this time line, advance planning about witness travel, witness preparation and witness proofing was done and executed. At the end of each trial day, this time line was updated with the real data. In the same time line, other judicial functions such as motion due dates were incorporated.

3.2.3 Disclosures

Every team was responsible for the disclosure of relevant material under Rules 66, 67 and 68. These are the affirmative obligations on the Prosecutor to disclose the material supporting the

indictment and also the exculpatory material suggesting innocence or mitigating the guilt of the accused or affecting the credibility of prosecution evidence. For the exculpatory material, the obligation continues even after the trial.

Every team kept an inventory of all material disclosed and /or inspected and these inventories were created in word document tables, excel sheets and data entries in GELOD. There have been mixed approaches to the manner and format of disclosures, such as paper based disclosures: redacted and un-redacted, CD/DVD format, email attachments, disclosures directly to the defence, disclosures through the Trial Chamber Coordinator and disclosures before trial, during trial and after trial.

In spite of exhaustive disclosures and its record keeping, issues such as incomplete disclosures, late disclosures, and disclosure violations continued to haunt the prosecution teams in almost all trials and on the case to case basis. Trial Chambers awarded remedies that were proportionate to nature of the disclosure violations and their impact on trial proceedings ensuring fairness without any prejudice.

On a few occasions, the voluminous nature of materials in the possession of the OTP created delays in disclosures of few documents and then, OTP started individual team wide mechanisms improving retrieval of relevant material and improving record keeping of the disclosed materials. Also, specific disclosure database **Electronic Disclosure Suite (EDS)** was developed where all the material in the possession of the OTP was archived. While inputting the material, due

consideration on the safety of the witnesses and victims was accorded and so some of the material was redacted. The defence teams were facilitated to have access for search functions and they used this database from their respective locations.

Disclosure obligations are essential to the right to a fair trial and the OTP is obligated to actively review the material in its possession. Further, as this obligation is of positive nature, it could be useful for the OTP to have a robust mechanism of reviewing the material and disclosing the relevant evidence, incriminating and exculpatory, timely and as soon as practicable. This OTP wide mechanism should have uniform and streamlined disclosure practices and efficient record keeping system. Specialized team with research and analysis capabilities on disclosure issues should be the centralized focal point to supplement individual OTP trial teams.

3.2.4 Pre-trial briefs, time limits and word limits

Pre-trial status conference, time limits on motion practices, time limits set by the Trial Chamber on various trial requirements and strict monitoring mechanism keep the case management efficient and focused. The pre-trial brief consists of factual and legal issues, admissions by the parties, matter not in dispute, contested matters of facts and law, list of witnesses to be examined through viva-voce, summary of facts on which each witness testify, linkages to indictment and estimated time.

This brief becomes the guiding strategy for the Prosecutor and during the trial process, it is referred when the scope of the case and the relevance of evidence are challenged. The provisions with regard to time limits on disclosures and motion practices, and word limits on various motions

and closing briefs force the Trial Teams to manage cases efficiently and remain focused. On account of these practices, complex cases have been presented in efficient manner without comprising the principle of fairness in the proceedings.

6. Conclusions

These types of complex cases for mass crimes were never litigated before any international court except Nuremberg Trial and Tokyo Trial, which had different contextual and trial practices. Since its inception, the ICTR developed new practices to enhance the fairness and expeditiousness of trial.

The OTP continuously improved its case management mechanisms to streamline investigative and prosecutorial processes eliminating duplication of functions, improving coordination and generally bringing efficiency in investigation and prosecution of cases. These OTP mechanisms have contributed to shaping and developing the international criminal law jurisprudence. As the Tribunal was established for the sole purpose of prosecuting persons responsible for genocide and other serious violations of International Humanitarian Law committed in Rwanda in 1994, hence, most of the evidence had been in the form of technology available in Rwanda during 1994. But, for the case management, the OTP adopted the best technology available in the field of streamlining of cases, case preparation and case presentation.

With the progressive development in technology in the areas of digitization, archiving, storage, retrieval, data analysis, artificial intelligence, and communications, the OTP also kept on upgrading and adopting technological advances bringing more efficiency in investigation and

prosecution. OTP was able to develop its capacity to meet the operational challenges which were generated on account of jurisprudential development in the field of international criminal law.

OTP has acquired enormous knowledge, skills and experiences on these issues. It should share the best practices and lessons learnt with other stakeholders and strive towards making international justice efficient. The best practices discussed herein streamlined the cases and improved the case management functions.

However, in future investigation and trials of international crimes of large magnitude, the lessons learnt could be incorporated in the areas of evidence management, witness management and disclosure systems.

Evidence management tools, especially, techniques of recording, handling, storage and analysis have to be re-engineered to match the types of evidence and its volume. Digitized evidence would require more forensic/ reliability analysis and technology driven chain of custody.

A **comprehensive OTP witness database** containing GPS location of witness place of stay, electronic contact details/digital identity, recording of each contact/meeting with witness, details of previous contacts/interviews, safety concerns and witness support issues would be more useful for witness management functions. This database should be accessible through mobile software application enabling OTP personnel to refer, use and update from remote locations.

Then, a **robust disclosure system** with OTP wide mechanisms for disclosure policies, record keeping, and research and analysis capacity should supplement the trial teams. Specialized team functioning as the centralized focal point should be able to bring uniformity among all trial teams improving the disclosure system.
